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No. 07-396

IN THE

Supreme Court of the United States

VELIMIR PAVLOV, *et al.*,

Petitioner,

v.

INGLES MARKETS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's granting of the Respondent's motion for summary judgment finding that Mr. Pavlov was judicially estopped from pursuing his lawsuit because he failed to disclose the instant litigation as an asset in his Chapter 13 bankruptcy does not conflict with a decision of this Court or a Court of Appeals, where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court, where Petitioners do not claim that the Eleventh Circuit's ruling has so far departed from the accepted and usual course of judicial proceedings, and where Petitioners do not claim that the Eleventh Circuit has sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory power.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Ingles Markets, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Eleventh Circuit's June 6, 2007 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals. *See* Sup. Ct. R. 10(a). In fact, the Petitioners have not cited this Court to any case law of any Circuits. Petitioners fail to argue or demonstrate that the Eleventh Circuit decided an important federal question that has not been settled by this Court. Id. Petitioners fail to demonstrate that the Eleventh Circuit's ruling has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Id. The Petitioners fail to demonstrate that the Eleventh Circuit has sanctioned such a departure by the District Court as to call for an exercise of this Court's supervisory power. *See* Sup. Ct. R. 10(a)-(c). Rather, at best, the Petitioners argue that the Eleventh Circuit and the District Court based their decisions upon erroneous factual findings or the misapplication of a properly stated rule of law. Therefore, the Petition should be denied.

The "Questions Presented for Review" by the Petitioners state that judicial estoppel was improperly applied to the Petitioners' lawsuit because of mistakes made by their bankruptcy attorney and their attorneys in this case. Based upon their attorneys' mistakes, the Petitioners allege that their attorneys have engaged in a conspiracy with the Respondent's attorneys to have their case dismissed. The Petitioners argued that this alleged conspiracy allows conspiracies to occur in the

American judicial system. The Petitioners are asking this Court to grant their Petition based on these alleged conspiracies. The Petitioners have failed completely to carry their burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

MISSTATEMENTS AND ERRORS BY THE PETITIONERS

The Petitioners have failed to present with accuracy, brevity and clarity what is essential for this Court to readily and adequately understand the points requiring consideration as required by Sup. Ct. R. 14.4. Therefore, the Petition should be denied.

The Petitioners have failed to comply with Sup. Ct. R. 14.1. Therefore, the Petition should be denied.

The Petitioners are not permitted to Petition this Court for review of the District Court's March 22, 2005 Order, improperly identified by the Petitioners as the June 30, 2004 Order. The Eleventh Circuit determined that because the Petitioners did not argue any issues relating this Order on appeal, the Petitioners had abandoned any such claims.

The Petitioners have misstated the Eleventh Circuits holding in *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268 (11th Cir. 2004) and its application to the present case. Both the District Court and the Eleventh Circuit analyzed and distinguished *Parker* from the facts of the present case. As such, Petitioners reliance upon this case is misplaced.

Petitioners have misstated the facts of the case in their Petition. Because the Petitioners have misstated the facts of the case and such misstatements bear on what issues would properly be before the Court, it is necessary for the Respondent to provide the Court with the facts of the case. Misstating facts has been a constant problem for Pavlov throughout this litigation. In its March 22, 2005 Order, the District Court stated as follows:

> As Defendants strenuously argued in their motions for summary judgment, the court does have some concern about the variations of Mr. Pavlov's testimony. Significant aspects of Mr. Pavlov's testimony have changed from his testimony at his criminal trial, to his civil deposition, and finally in his response to Defendants' motions for summary judgment. Under these circumstances, the court finds it must caution Plaintiffs about the issue of perjury.

STATEMENT OF THE CASE

I. Procedural History.

Petitioners filed suit against Ingles Market, Inc., Greg Tolbert, Officer C.E. Morris, in his individual and official capacities, Police Chief W.H. Dean, in his individual and official capacities, and Gwinnett County, Georgia alleging in twelve counts constitutional violations, claims pursuant to 42 U.S.C. §§ 1983 and 1985, state constitution claims, false imprisonment, false arrest, assault and battery, malicious prosecution,

intentional infliction of emotional distress, negligent infliction of emotional distress, negligent training and supervision, respondeat superior/vicarious liability, loss of consortium, and punitive damages. Plaintiffs sought $10,000,000 in general damages for the first ten counts of the complaint plus damages for loss of consortium and punitive damages. Petitioners alleged that on May 28, 2001, Velimir Pavlov ("Pavlov") entered the Ingles grocery store in Dacula, Georgia. On the way out of the store, Pavlov contends that he was assaulted by one of the store's assistant managers. Then, according to Pavlov, Greg Tolbert, the store's manager, instructed employees to block Pavlov's car in the parking lot and to detain Pavlov. Pavlov further contends that one of the store's employees pulled a gun out and demanded money from him. Pavlov alleges that when Officer Morris, a Gwinnett County police officer, arrived, he, too, began to accost Pavlov. Pavlov was charged with obstruction of a law enforcement officer, simple battery, and DUI. On March 27, 2002, a jury acquitted Pavlov of all charges. Based upon these allegations, Petitioners filed the civil action described herein.

Following discovery, all Defendants moved for summary judgment. The District Court granted summary judgment to Tolbert, Officer Morris, Police Chief Dean, and Gwinnett County. The District Court granted Ingles motion for summary judgment on the Petitioners' claims for false arrest, malicious prosecution, negligent infliction of emotional distress, and intentional infliction of emotional distress. The district court found that, pursuant to Pavlov's version of events, Petitioners' claims for false imprisonment, assault and battery, negligent retention, and loss of consortium could proceed.

On April 7, 2005, Pavlov filed for Chapter 13 bankruptcy. On May 17, 2005, the Bankruptcy Trustee filed an objection to the plan and requested the appointment of special counsel. On June 8, 2005, Pavlov amended his plan and reduced the dividend to unsecured creditors. Pavlov's plan was confirmed on August 19, 2005. Respondent filed a motion for summary judgment based upon judicial estoppel. On April 11, 2006, the District Court granted Respondent's motion.

Petitioners appealed the previously granted summary judgment and the summary judgment based on judicial estoppel. On June 6, 2007, the Eleventh Circuit, in a per curiam opinion, affirmed the District Court's application of judicial estoppel. Further, the Eleventh Circuit determined that because the Petitioners did not argue any issues relating to the District Court's prior order granting summary judgment, the Petitioners had abandoned any such claims.

II. Facts Regarding Underlying Incident.

On May 28, 2001, Jeffrey Meeks, a non-party to this litigation, called 911 to report that a van was swerving from one side of the road to the other and that 6 or 7 brown bottles, believed to be beer bottles, had been thrown out of the van. Meeks followed the van for approximately 4 to 5 miles. Meeks followed Pavlov to Ingles and saw Pavlov go into the store. Officer Morris was notified by radio of these complaints.

Morris was notified that this van was in the Ingles parking lot. Upon arriving at Ingles, at least three (3)

vehicles were blocking the van in the parking lot and the drivers of these vehicles were outside of their vehicles. Morris told the individuals to move their vehicles, and he parked a short distance away to observe the van in question. Morris indicated he could not do anything about the situation until he saw Pavlov in the van driving.

At his criminal trial, Pavlov testified he went to Ingles to buy vegetables. Because the vegetables were not in good condition, he decided his wife could buy the vegetables at a later time and he left the store. When Pavlov exited the store, his car was blocked by another car and three individuals were in front of the car and one individual was behind the car. He asked the individuals to move the car. They responded that Pavlov owed them $100 for hitting their car. Pavlov claims the individual behind the car pulled a gun from his pocket. The person who pulled the gun was wearing a yellow and blue striped shirt. Pavlov stated he would go inside and get the money.

Pavlov went back into the Ingles and grabbed an employee and asked for the manager. Pavlov could not find the manager so he went to the pay phone to call the police. Through the window of the store, he could see the individuals who were blocking his car move their car. Pavlov then left the store and as he was leaving, he heard someone yelling for him to stop. Pavlov stopped and determined that Morris was yelling at him. Morris asked Pavlov for identification. As Pavlov was trying to take his wallet from his pocket, he claims that Morris began to strike him with an ASP baton. Pavlov began to walk away from the officer and the officer yelled for him to

lie down. Pavlov claims he was afraid to get on the ground. Meeks and the officer took Pavlov to the ground.

In the civil case, however, Pavlov tells a different story. Pavlov went into Ingles to buy some vegetables and a bottle of wine. As he was paying for groceries, he heard a voice saying not to give him a receipt because he was drunk and could not buy the wine. Pavlov claims the bag boy took the wine and Pavlov grabbed the boy by the wrist. Pavlov then claims that he was grabbed by the neck from behind by an individual who said not to let Pavlov buy the wine. Pavlov claims that the man who grabbed him by the neck was working for Ingles, was the assistant manager of Ingles and was wearing a green and blue striped shirt. Pavlov was able to turn out of the headlock and was then approached by the manager, Greg Tolbert. Pavlov took his bag of groceries and walked towards the door. Pavlov pushed his cart out to his van to unload the groceries but decided not to take the groceries. He had gotten halfway back to the store when he noticed the man who had grabbed him by the back of the neck. Pavlov says that Tolbert told two female employees, who were pushing carts into the store, not to let him into the store. When he started toward the store, he claims the two girls grabbed him by the neck. He told the girls to let him go and they complied.

Pavlov then noticed a car pulling behind his car and when he approached, a girl was sitting on the hood of the car blocking his car. He claims this girl was an Ingles' employee because she checked him out on a previous occasion, but he cannot say that she was working or on duty on the night in question. A tall boy was with this girl but Mr. Pavlov did not recognize this boy as an

Ingles' employee. Pavlov asked the people to move their car and the tall man said Pavlov owed him $100. Pavlov noticed that a fourth individual was with them and this fourth person allegedly pulled a gun on Pavlov. Pavlov did not know if the man who pulled the gun worked for Ingles. Pavlov returned to the Ingles to withdraw $100. When Pavlov got inside the Ingles store, he did not call 911 from the payphone. Instead, he attempted to get the Ingles' manager to call the police but could not get the manager to call the police. When the police arrived a short time later, Pavlov did not tell Morris that someone had pulled a gun on him. During the litigation, Pavlov identified Shane Haley, an Ingles' manager, as the man in the striped shirt. However, Haley was out on disability leave with two broken ankles from March 2001 through June 2001.

Much more consistent with Pavlov's testimony at the criminal trial, Greg Tolbert, Ingles' front end manager, testified that he noticed Pavlov walking back and forth between the two entrances and looking out the doors. As Pavlov was at the one of the entrances, Nathan Sanders, an Ingles employee, came through the door. Pavlov grabbed Sanders by the arm and turned him around. Tolbert approached Pavlov and told him to let go of the employee and asked Pavlov to leave the store. Pavlov accused Sanders of calling the police on him. Tolbert did not call the police and has no knowledge of anyone from Ingles calling the police on Pavlov. Rather, Tolbert stepped outside the Ingles and motioned for a Gwinnett County police officer, who he had watched pull up earlier, to come inside the store.

Tolbert went outside and asked Morris to handle the situation. When Morris went inside the store, Pavlov was at the payphone and kept dropping quarters on the floor. Morris asked Tolbert if Sanders wanted to press charges and Tolbert responded that he did not think so. Tolbert told Morris he just wanted Pavlov to leave the store. Morris asked Pavlov to get off the phone. Pavlov stated he was leaving the store. Pavlov also stated he knew his rights and they could not hold or detain him and he walked out of the store. Morris responded by asking Pavlov if he wanted his license back but Pavlov ignored the officer. Morris decided to arrest Pavlov for disorderly conduct because Morris believed he had ample probable cause. Morris grabbed Pavlov by his arm and told him to stop just as they got outside the store. Morris informed Pavlov he was under arrest. Morris intended to charge Pavlov with disorderly conduct because Pavlov was intoxicated, boisterous, rude, uncooperative, loud, and causing a scene. Pavlov walked away from Morris in a hurried manner and Morris followed Pavlov into the parking lot telling him to stop and get on the ground. Morris grabbed Pavlov's left arm but Pavlov jerked away from Morris. Morris knew he needed back-up.

Morris tried to effectuate the arrest from the time Pavlov exited the Ingles, and this incident escalated into the parking lot with Pavlov resisting the entire time. Pavlov started for his vehicle and Morris struck him with his ASP baton. The first blow with the baton was to Pavlov's right leg but the blow did not appear to faze Pavlov. Pavlov did not react to the hit from the baton and Morris hit Pavlov a second time. Morris hit Pavlov with the baton several times and was still not able to subdue Pavlov, who continued to resist arrest. At this

point, Meeks asked Morris if he needed help and Morris responded that he did. Morris needed help because he was afraid that either he or Pavlov was going to get hurt without assistance. Meeks grabbed Pavlov in a bear hug and took him to the ground. With Meeks's assistance, Morris was able to place Pavlov under arrest. No one from Ingles was involved in or assisted in Pavlov's arrest. Pavlov identified the man who grabbed him by the neck in the store and the man who assisted the officer in arresting him as the same person. However, Pavlov disputes that this person was Meeks. Pavlov admits Tolbert did not take him to the ground.

Following the arrest, Pavlov was transported to Gwinnett Medical Center for examination. At Gwinnett Medical Center, Pavlov was belligerent, abusive and refused treatment. Pavlov was then taken to the Gwinnett County Jail. Officer Morris took out an arrest warrant for obstruction of an officer.

No one at Ingles suggested to Morris that Pavlov should be arrested. In fact, Tolbert told Morris that he did not think that Sanders wanted to press charges. No one at Ingles suggested that Morris take out a warrant for any crime. No Ingles' employee blocked Pavlov's van. Meeks does not own a gun and did not see the other couple that blocked Pavlov's van with a gun.

Ingles' employees are required to wear white shirts and khaki pants. The Ingles' managers wear white or light colored dress shirts, khaki or dark pants, dress shoes and a tie. Employees are not allowed to work if they are not wearing the appropriate clothing. Ingles' employees are not allowed to wear striped shirts to work.

Pavlov was ultimately charged with felony obstruction of a police officer, simple battery, and driving under the influence of alcohol. In bringing the charges of simple battery and driving under the influence of alcohol, Morris consulted with Gwinnett County District Attorney Danny Porter. These charges were presented to the grand jury and the grand jury returned an indictment against Pavlov. In a subsequent criminal trial on these charges, Pavlov was found not guilty.

III. Facts Regarding the Application Judicial Estoppel.

On April 7, 2005, Pavlov filed a Voluntary Petition for Chapter 13 bankruptcy in the United States Bankruptcy Court, Northern District of Georgia, Gainesville Division. In that petition, Pavlov declared under penalty of perjury that the information provided was true and correct. In Paragraph 4 of the Statement of Financial Affairs filed with the petition entitled "Suits and administrative proceedings . . .", Pavlov lists this lawsuit and describes the nature of this proceeding as "Plaintiffs request for Depositions of Ingles Employees". Pavlov signs the Statement of Financial Affairs under penalty of perjury. In Schedule B. entitled "Personal Property", Pavlov indicates in response to Type of Property No. 20, "Other contingent and unliquidated claims of every nature . . ." that there are no such claims. Pavlov declared under penalty of perjury that he read the schedules and the schedules were true and correct.

Pavlov's original "Debtor's Chapter 13 Plan" allowed for unsecured creditors to be paid 16 cents on the dollar. On May 17, 2005, the bankruptcy trustee objected to

Pavlov's plan. In the objection, the trustee noted that an application for special counsel was needed. On June 8, 2005, Pavlov, by and through his bankruptcy attorney, amended the Debtor's Plan and Schedules to reduce the unsecured creditors' dividend to 6 cents on the dollar. Pavlov also amended his petition to show this case as a debt of $3,642.25 pursuant to judgment. Pavlov declared under penalty of perjury the amendment was true and correct. On August 12, 2005, Pavlov again confirmed under penalty of perjury there were no further modifications to his case and Plan. On August 19, 2005, the plan, as amended, was confirmed.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Likewise, the decisions below do not so far depart from the accepted and usual course of judicial proceedings nor has Eleventh Circuit sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory power. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reason" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The District Court's Application of Judicial Estoppel Is Reviewed for Abuse of Discretion.

Judicial estoppel is an equitable doctrine invoked at a court's discretion. *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 1815, 149 L.E.2d 968 (2001)(internal citations omitted). Under this doctrine,

a party is precluded from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding. Judicial estoppel is an equitable concept intended to prevent the perversion of the judicial process. *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002). The Court of Appeals reviews a district court's application of judicial estoppel for abuse of discretion. *Id.* at 1284 (internal citation omitted). While the application of judicial estoppel is reviewed for abuse of discretion, Petitioners must also carry their significantly more strenuous burden of demonstrating that there are compelling reasons to grant the Petition. Here, the Petitioners have not carried their burden. Rather, to the extent that the Petitioners have asserted error, the asserted error involves the Petitioners claim of erroneous factual findings or the misapplication of properly stated principles of judicial estoppel. Petitioners have not carried their burden because this is simply an unremarkable case in which the District Court exercised its considerable discretion in applying judicial estoppel.

II. The Eleventh Circuit's Criteria for the Application of Judicial Estoppel is Consistent with this Court's Instructions.

The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. *New Hampshire*, 532 U.S. at 749-750. In the Eleventh Circuit, judicial estoppel is applied to the calculated assertion of divergent sworn positions. The doctrine is designed to prevent parties from making a mockery of justice by inconsistent

pleadings. *American National Bank of Jacksonville v. Federal Deposit Insurance Corp.*, 710 F.2d 1528, 1546 (11th Cir. 1983); *Burnes*, 291 F.3d at 1285.

The doctrine of judicial estoppel protects the integrity of the judicial system, not the litigants; therefore, numerous courts have concluded, and the Eleventh Circuit agrees, that while privity and/or detrimental reliance are often present in judicial estoppel cases, they are not required. *Burnes*, 291 F.3d at 1286 (quoting *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360 (3rd Cir. 1996); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 214 (1st Cir. 1987); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)). Courts have also concluded that since the doctrine is intended to protect the judicial system, those asserting judicial estoppel need not demonstrate individual prejudice. *Burnes*, 291 F.3d at 1286.

The Eleventh Circuit considers two factors in the application of judicial estoppel. *Salomon Smith Barney, Inc. v. Harvey, M.D.*, 260 F.3d 1302, 1308 (11th Cir. 2001). First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system. *Id.*; *Burnes*, 291 F.3d at 1285. The Eleventh Circuit's two factors are consistent with this Court's instructions regarding judicial estoppel and its factors provide courts with sufficient flexibility in determining the applicability of the doctrine of judicial estoppel based on the facts of a particular case. *Burnes*, 291 F.3d at 1285-1286. Therefore, the Petitioners have not argued, nor could

they argue, that the decisions below have so far departed from the accepted and usual course of judicial proceedings or that the Eleventh Circuit has sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory power.

III. The District Court Did Not Abuse Its Discretion by Correctly Applying Judicial Estoppel.

The District Court correctly determined that judicial estoppel could be applied against the Petitioners' claims despite any interest of the bankruptcy Trustee in the causes of actions as the property of Pavlov's bankruptcy estate.

A. Pavlov's inconsistent statements were made under oath.

Each of Pavlov's bankruptcy forms were submitted under oath and under penalty of perjury to the Bankruptcy Court. Therefore, the district court properly determined that first factor for the application of judicial estoppel had been met.

B. Pavlov's representations to the bankruptcy court were calculated to make a mockery of the judicial system.

A debtor seeking shelter under the bankruptcy laws must disclose all assets, or potential assets, to the bankruptcy court. 11 U.S.C. § 521(1) and 541(a)(7). Full and honest disclosure in a bankruptcy case is crucial to the effective functioning of the federal bankruptcy system. *Burnes*, 291 F.3d at 1286 (quoting

Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3rd Cir. 1996). Creditors and the bankruptcy court rely on the accuracy of the disclosure statements. *Burnes*, 291 F.3d at 1286. The importance of full and honest disclosure cannot be overstated. *Burnes*, 291 F.3d at 1286 (quoting *Ryan Operations*, supra). Deliberate or intentional manipulation can be inferred from the record. *Burnes*, 291 F.3d at 1287. A debtor's failure to satisfy its statutory disclosure duty is inadvertent only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment. *Burnes*, 291 F.3d at 1286 (quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999)).

i. Pavlov had knowledge of this lawsuit.

In the present case, the record is clear that Pavlov had knowledge of his claim against Ingles. The incident at issue occurred on May 28, 2001 and Pavlov filed this litigation on May 14, 2003. Pavlov was represented by an attorney in the bankruptcy proceeding. The record leaves no doubt that prior to filing his bankruptcy petition on April 7, 2005 that Pavlov was aware of the present lawsuit, the nature of the present lawsuit, and that he was seeking money damages as part of this lawsuit. Despite this knowledge, Pavlov failed to disclose the nature of this lawsuit and the money damages he was seeking. However, in his Statement of Financial Affairs, Pavlov describes the nature of this litigation as "Plaintiffs request for Depositions of Ingles Employees". In Schedule B. entitled "Personal Property" in response to No. 20, Pavlov indicates that there are no "other contingent and unliquidated claims of every nature . . ."

Rather, when instructed by the trustee to file an application for special counsel, Pavlov amends his financial disclosures to show this lawsuit as a debt as opposed to a claim where he was seeking over $100 million.

ii. Pavlov had a financial motive to conceal this litigation.

Pavlov had a financial motive to conceal the present lawsuit and the nature of the present lawsuit. The Eleventh Circuit has noted that a financial motive to secret assets exists under Chapter 13 as well as under Chapter 7 because the hiding of assets affects the amount to be discounted and repaid. *De Leon v. Comcar Industries, Inc.*, 321 F.3d 1289, 1291 (2003). Pavlov gained an advantage when he changed this lawsuit to a debt of the estate. See *Barger v. City of Cartersville*, 348 F.3d 1289, 1296 (11th Cir. 2003). By omitting the claims, Pavlov could keep any proceeds for himself and not have the proceeds become part of the bankruptcy estate. *Id.*

In the present case, Pavlov lists the present lawsuit in his original petition and describes the nature of this proceeding as "Plaintiffs request for Depositions of Ingles Employees". In his schedule of property, Pavlov indicates that there are no contingent nor unliquidated claims. Pavlov's original "Debtor's Chapter 13 Plan" allowed for unsecured creditors to be paid 16 cents on the dollar. On June 8, 2005, Pavlov amended the Debtor's Plan and Schedules to reduce the dividend to unsecured creditors to 6 cents on the dollar. Pavlov also amended his Petition to show this litigation as a debt of $3,642.25

pursuant to judgment. On August 12, 2005, Pavlov again confirmed there were no further modifications to his case and Plan.

Pavlov's financial benefit is not hypothetical but has actually occurred. After amending his plan and schedules to indicated that a judgment had been rendered against him in this lawsuit, Pavlov received a financial benefit because the amount paid to unsecured creditors was reduced from 16 cents on the dollar to 6 cents on the dollar. There is no evidence of record that Pavlov ever disclosed to the trustee or creditors the potential monetary value of this lawsuit. Rather, Pavlov amended his plan to indicate that a judgment had been rendered against him. This conduct indicates that Pavlov attempted to deceive the trustee and the bankruptcy court. Based upon these facts, the district court properly exercised its discretion by determining that Pavlov had something to gain from misrepresenting this litigation to the bankruptcy court. Therefore, the district court did not err by determining that the Plaintiffs' claims were barred by judicial estoppel.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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